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88-476

No.

Supreme Court, U.S.
FILED
SEP 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

ROMEO G. DELUMEN,
Petitioner,

VS.

UNITED STATES POSTAL SERVICE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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Counsel for Petitioner

September 15, 1988

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTION PRESENTED

Whether the time for filing a petition for review from a decision of the Merit Systems Protection Board commences to run from receipt of the decision by the petitioner as provided by statute, or whether receipt of the decision by petitioner's counsel prior to receipt or knowledge of the decision by the petitioner is sufficient to commence the running of the thirty day period for filing an appeal.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The petitioner Romeo G. Delumen prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit entered in the above-entitled case on June 20, 1988.

OPINION BELOW

The opinion of the United States Court of Appeals for the Federal Circuit is unreported and appears in the Appendix hereto. The final decision of the Merit Systems Protection Board is attached in the Appendix hereto.

JURISDICTION

The order of the United States Court of Appeals for the Federal Circuit dismissing Romeo G. Delumen's petition for review was entered on June 20, 1988. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. Section 1254(1).

STATUTE INVOLVED

This case involves interpretation of 5 U.S.C. Section 7703(b)(1), which states as follows:

Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Nothwithstanding any other provision of law, any petition for review must be filed within 30 days after the date the petitioner received notice of the final order or decision of the Board.

STATEMENT OF THE CASE

On September 18, 1987, petitioner's counsel caused to be filed in the United States Court of Appeals for the Federal Circuit a Petition for Review from a final order of the Merit Systems Protection Board ("MSPB") upholding petitioner's removal from the U.S. Postal Service. Petitioner's counsel had received a copy of the MSPB order on August 17, 1987; petitioner had not received his copy of the order until August 19, 1987. Based upon the date of receipt of the decision of the MSPB by petitioner, the last allowable day to file a petition for review pursuant to 5 U.S.C. Section 7703(b)(1) fell on September 18, 1987. Following the filing of the petition for review, the case proceeded forward with petitioner filing his opening brief on May 7, 1988.

On June 1, 1988, petitioner's counsel received respondent's motion to dismiss for lack of jurisdiction, based upon the failure to file the petition for review with the Court of Appeals within 30 days from receipt to the MSPB decision by petitioner's counsel. Petitioner filed his response in opposition to the motion to dismiss on June 13, 1988. By order entered on June 20, 1988, the Court granted respondent's motion to dismiss and concurrently issued said order as a mandate.

REASONS FOR GRANTING THE WRIT

The Decision Below Conflicts With Prior Decisions As to the Proper Interpretation of 5 U.S.C. Section 7703(b)(1).

In issuing its order dismissing petitioner's case, the Federal Circuit relied on its prior decision *Gragg v. United States,* 717 F. 2d 1343 (Fed. Cir. 1983), in which it held that service on a petitioner's designated representative commences the running of the 30 day appeal time. However, as petitioner stated in his opposition filed in response to the motion to dismiss, the Federal Circuit had ruled in *Brown v. National Highway Traffic Safety Administration,* 673 F. 2d 544 (Fed. Cir. 1982) that the thirty day period for filing an appeal from an adverse decision of the MSPB commences to run from the date of personal receipt of the notice on the party. Therefore, in the *Brown* case, it was held that a petition for review was timely filed exactly 30 days after the Federal employee received notice of the Board's decision, notwithstanding the fact that the petition was filed 35 days after the designated counsel had received notice of the decision. In so ruling, the Court reasoned that the client has the final and ultimate authority in deciding whether an appeal should be filed.

The Federal Circuit's order dismissing petitioner's appeal constitutes an inconsistency with its prior decisions relating to interpretation of Section 7703(b)(1) and conflicts with the plain language of the statute. In ruling that the 30 day period for filing an appeal commences prior to actual service on the party, the Court has effectively deprived petitioner of his due process rights as provided by the Fourteenth Amendment to the United States Constitution.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the order and opinion of the Federal Circuit.

Respectfully submitted,

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Counsel for Petitioner

September 14, 1988

APPENDIX

Note: This Order has not been prepared for publication in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent.

United States Court of Appeals
for the Federal Circuit

87-3568

Romeo G. Delumen,
Petitioner,

vs.

United States Postal Service,
Respondent.

On Motion

Before Markey, Chief Judge, Newman and Michel, Circuit Judges. Markey, Chief Judge.

ORDER

The United States Postal Service moves to dismiss Romeo G. Delumen's petition for review for lack of jurisdiction. Delumen has filed an opposition out of time.

As indicated by the certified mail return receipt, Delumen's attorney received a copy of the Merit Systems Protection Board's final decision on August 17, 1987. Thirty-two days later, on September 18, 1987, Delumen filed his petition for review in this court.

Pursuant to 5 U.S.C. § 7703(b)(1), a petition for review must be filed "within 30 days after the date the petitioner received notice of the final order or decision of the Board." The 30-day appeal period is statutory, mandatory, and jurisdictional. *Monzo v. Department of Transportation*, 735 F.2d 1335, 1336 (Fed. Cir. 1984). Service on a petitioner's designated representative starts the running of the 30-day appeal time. *Gragg v. United States*, 717

F.2d 1343 (Fed. Cir. 1983). Here, the petition was not filed within 30 days of receipt by Delumen's counsel.

Accordingly,

IT IS ORDERED THAT:

The Postal Service's motion to dismiss is granted.

FOR THE COURT

HOWARD T. MARKEY
Howard T. Markey
Chief Judge

Date: June 17, 1988

United States of America
Merit Systems Protection Board

DOCKET NUMBER
SF07528710209

Date: August 11, 1987

Romeo G. Delumen,
Appellant,

vs.

United States Postal Service,
Agency.

Arnold Chin, Esquire, San Francisco, California, for the appellant.

Arline S. Tyler, San Bruno, California, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Dennis M. Devaney, Member

ORDER

After full consideration, the Board DENIES the appellant's petition for review of the initial decision issued on March 24, 1987, because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. This is the Board's final order in this appeal. The initial decision in this appeal is now final. 5 C.F.R. § 1201.113(b).

NOTICE TO APPELLANT

You may petition the United States Court of Appeals for the Federal Circuit to review the Board's decision in your appeal if the court has jurisdiction. 5 U.S.C. § 7703. The address of the court is 717 Madison Place, N.W., Washington, D.C. 20439. The court must receive the petition no later than thirty days after you or your representative receives this order.

ROBERT E. TAYLOR
Robert E. Taylor
Clerk of the Board

FOR THE BOARD:
Washington, D.C.